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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANN MUNIZ and ED MUNIZ, JOSEPH and DIANE SHROKA, individually and on behalf of all others similarly situated,	)	
Plaintiffs	)	No. 04 C 2405
v.	)	Judge John W. Darrah
REXNORD CORPORATION; AMES SUPPLY CO.; THE MOREY CORPORATION; SCOT INCORPORATED; LINDY MANUFACTURING CO.; PRECISION BRAND PRODUCTS, INC., TRICON INDUSTRIES, INC. AND MAGNETROL INTERNATIONAL, INC.	)	
Defendants.	)	

NOTICE OF MOTION

PLEASE TAKE NOTICE that on the ~~July~~ August 16, 2004, at 9:00 a.m., I shall appear before the Honorable Judge John W. Darrah or any judge sitting in his place or stead in Courtroom 1203 in the Federal Courthouse, 219 South Dearborn, Chicago, Illinois, and then and there present:

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

A copy of said motion is attached to this notice.

DATED: July 6, 2004

Respectfully submitted,

By: _____
One of Their Attorneys

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CERTIFICATE OF SERVICE

I, Patrick J. Sherlock, an attorney, hereby certify that on July 6, 2004 I caused true and correct copies of the foregoing to be served via U.S. Mail, postage pre-paid, to all persons identified on the attached Service List.

Patrick J. Sherlock

SERVICE LIST
Muniz, et al. v. Rexnord Corporation, et al.
04 C 2405

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Defendants.	)	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs Ann and Ed Muniz and Joseph and Diane Shroka, individually, and on behalf of all others similarly situated, move, pursuant to Federal Rule of Civil Procedure 23, for class certification. In support of their motion, plaintiffs state

1. On April 2, 2004, plaintiff filed a nine count complaint against the defendants seeking damages for contamination caused by the defendants. In Count I, plaintiffs seek to recover under CERCLA, 42 U.S.C. § 9607(a); Count II under RCRA § 6972(a)(1)(B); Count III under the common law of nuisance; Count IV under the common law of trespass; Count V under strict liability in tort; Count VI under the doctrine of *res ipsa loquitor*; Count VII under common law negligence; Count VIII under negligence based upon a statutory violation (i.e. a violation of the Illinois Environmental Protection Act, 415 ILCS 5/12(a)); and Count IX for willful and wanton misconduct.

2. Defendants have answered most of the claims asserted in the Complaint. The parties are currently briefing the issues upon which the defendants have moved to dismiss – that is, to dismiss Count II and strike certain portions of the remaining allegations. Thus, even after the Court has ruled upon the pending motions to dismiss, many of plaintiff's claims will remain pending.

3. Plaintiffs incorporate their memorandum in support of this motion herein.

WHEREFORE, plaintiffs respectfully request that this Court certify this case as a class action as stated in this motion and the memorandum filed contemporaneously herewith.

DATED: July 6, 2004

Respectfully submitted,

By: _____
One of Their Attorneys

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NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Plaintiffs	)	No. 04 C 2405
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Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

Plaintiffs Ann and Ed Muniz and Joseph and Diane Shroka, individually, and on behalf of all others similarly situated, submit this memorandum in support of their motion for class certification.

INTRODUCTION

Plaintiffs are residents whose homes are located within a Superfund site designated by the United States Environmental Protection Agency ("USEPA"). Plaintiffs seek to certify a putative class of the owners and residents of more than 800 homes located in unincorporated DuPage County, Illinois whose drinking water has been contaminated by cancer-causing pollutants dumped by defendants. Prior to discovering the contamination caused by the defendants, plaintiffs and the putative class used water from groundwater wells as their sole source of water

for drinking, bathing and other potable uses -- that is no longer the case because all of these wells have been ordered sealed.

Plaintiffs have discovered that the drinking water in their homes has been, and continues to be, polluted with unhealthful levels of dangerous chemicals, including trichloroethylene ("TCE") and perchlorethylene ("PCE"), known human carcinogens and mutagens. The defendants generated and dumped these dangerous chemicals, which have commingled in the groundwater and migrated onto Plaintiffs' properties. DuPage County has determined that the contamination caused by defendants could pose a danger to the health of those persons living in the affected area and, thus, enacted an ordinance that requires all homeowners in the affected area to connect to a public water supply.

From May 2001 to January 2002, the Illinois EPA sampled more than 500 residential wells in unincorporated areas near Downers Grove, Illinois, and found more than 400 of these wells to contain TCE and/or PCE. Of those, more than 200 were above the federal safe drinking water standards. As a result, USEPA conducted one of the most intensive ground water investigations ever undertaken in Northern Illinois.

The Ellsworth Industrial Park Site is a direct result of this $2 million-dollar effort. The investigation indicated that a group of 15 former and present businesses and individuals in the industrial park that investigation may be responsible for the residential ground water contamination. EPA sent General and Special Notice Letters to this group of "Potentially Responsible Parties," or PRPs, in the September and October of 2002.

THE CLASS REPRESENTATIVES

Ann and Ed Muniz reside in the class boundaries and own the property located at 5617 Pershing with a mailing address of Downers Grove, Illinois. Plaintiffs Joseph and Diane Shroka are residents in the class area and own the property located at 5854 Chase with a mailing address of Downers Grove, Illinois.

DEFENDANTS

Each defendant owns, occupies, operates and/or controls the properties located in the Ellsworth Industrial Park located immediately north of the Class Area.

Each of the defendants has operated a business facility within the Ellsworth Industrial Park and used TCE or PCE in their business for many years: Rexnord Corporation ("Rexnord") over 40 years; Ames Supply Co. ("Ames") approximately 39 years; The Morey Corporation ("Morey") for many years; Scot, Inc. ("Scot") approximately 43 years.; Lindy Manufacturing Co. ("Lindy") for many years; Precision Brand Products, Inc. ("Precision Brand") at least 9 nine years; Tricon Industries ("Tricon") for many years; and Magnetrol International, Inc. ("Magnetrol") approximately 20 years.

The USEPA has found the presence of either PCE or TCE in the ground and/or groundwater of each of the defendants. Additionally, defendants Magnetrol and Ames have been investigated in prior years for spills and/or leakage of chlorinated solvents.

BACKGROUND FACTS IN SUPPORT OF CLASS CERTIFICATION

The Release and Migration of Chlorinated Solvents to Plaintiffs' Homes

Each of the defendants has owned or operated facilities which generate or generated, and have dumped, spilled, or otherwise released chlorinated solvents, including TCE and/or PCE, into the soil and groundwater on their properties in the Ellsworth Industrial Park in Downers Grove, Illinois. (Compl. at ¶ 15)

TCE and/or PCE and other hazardous substances from each of the defendants' properties have commingled and migrated, and continue to migrate, in liquid and vapor form, in a groundwater plume running from defendants' properties toward and into Plaintiffs' properties and other properties in the Class Area, contaminating, infiltrating and threatening the soil, groundwater, domestic water supply and indoor air quality of the homes in the area. Plaintiffs and others in the Class Area have been exposed for many years to potentially dangerous levels of these chemicals through ingestion, dermal exposure and inhalation. (Compl. at 16)

Beginning in the spring and fall of 2001, the Illinois EPA performed a groundwater investigation just east of I-355 near Downers Grove, in the Class Area. The investigation consisted of three rounds of residential well sampling in the area. Approximately 495 private drinking water wells were sampled and analyzed for volatile organic chemicals. Sample results of more than 84% of the properties revealed elevated levels of PCE, TCE and/or other related VOCs. Over one-half of the samples collected during the first two rounds of sampling contained PCE and/or TCE above the federal safe drinking water standards. Based on these results, USEPA has classified the Ellsworth Industrial Park, including each of the defendants' properties,

and the groundwater contamination running from the defendants' properties onto Plaintiffs' properties, as a Superfund site. (Compl. at 17)

Due to the test results, in October 2001, the Illinois Department of Health advised that Plaintiffs and others in the Class Area cease using their wells for drinking water or other purposes. The Department of Health warned Plaintiffs and others in the Class Area to use an alternative water source or install a water treatment unit designed to remove volatile organic compounds. Additionally, in mid-2003, in response to the contamination, the DuPage County Board, citing its obligation to protect the health of its residents, declared "all homes in the [Class] area must be connected to a public water supply" and enacted legislation requiring that all private groundwater wells in the Class Area must be abandoned and sealed. (Compl at 18)

Despite their knowledge of the test results and their use of chlorinated solvents which have caused the drinking water and indoor air quality problems, none of the defendants have taken action to prevent contamination of the groundwater, and none of the defendants have, as of the date of this complaint, fully provided Plaintiffs or others in the Class Area with a permanent source, or even temporary source of safe water to drink and use in their homes. Nor have any defendants taken measures to fully curtail the inhalation risk from the contaminants into the homes of Plaintiffs and others in the Class Area. (Compl. at 19)

The releases and spills of hazardous substances from the defendants' properties and the subsequent migration of such substances from defendants' properties to the properties of Plaintiffs and others in the Class Area were a result of defendants' acts or omissions during their ownership and operations, and occurred on a regular basis throughout years of operation.

(Compl. at 20)

The Hazardous Nature of PCE and TCE and Other Solvents Spilled and Released by Defendants

TCE, PCE and the other volatile organic compounds released by defendants are dangerous substances, which have been linked to a variety of human illnesses, including cancer, and are severely destructive to the environment, including vegetation and wildlife. TCE exposure can cause, among other things, liver and kidney damage and cancers, impaired heart function, impaired fetal development in pregnant women, convulsions, coma and death. PCE exposure can cause, among other things, liver and kidney damage and cancers. (Compl. at 21)

The release of these chemicals by defendants presents an imminent and substantial endangerment to both Plaintiffs' health and that of others in the Class Area, and the environment. (Compl. at 22).

The Class Definition

Plaintiffs seek to represent the following class:

> All persons who currently, or in the past, own(ed) or reside(d), on property within the area bounded by Inverness to the north, 63rd Street to the south, Dunham Street to the east, and Interstate 355 to the west whose properties have been impacted, or a threat exists that it will be impacted, by hazardous substances released within the Ellsworth Industrial Site.

Plaintiffs have attached as Exhibit A a map prepared by USEPA which designates with a bold black line the boundaries of the Superfund Site (i.e. the

"Class Area")

LEGAL ARGUMENT

Plaintiffs seeking class certification must demonstrate that the proposed class litigation satisfies all of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure and at least one of the requirements set forth in Rule 23(b). This case satisfies these requirements.

In considering a motion for class certification, the Court should not inquire into the merits of the case, and must take the substantive allegations contained in the complaint as true. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 178 (1974); *Blackie v. Barrack*, 524 F.2d 891, 900-01, n.17 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *LeClercq v. Lockformer*, 2001 WL 199840 at *3.

Plaintiffs rely strongly upon two recent cases from the Northern District of Illinois which have been certified as class actions arising from substantially similar conduct in close proximity to the Class Area. First, Judge Leinenweber certified a class of persons in *LeClercq v. Lockformer*. In *LeClercq*, residents in the area south of Lockformer and Met-Coil's manufacturing facilities moved for and obtained class action status to pursue claims of groundwater contamination against Lockformer and Met-Coil. In *LeClercq*, as here, the plaintiffs relied upon private wells as their source of water for their homes. In *LeClercq*, as here, the contamination to the groundwater came from chlorinated solvents, including TCE.

Second, plaintiffs rely upon Judge Hibbler's order granting class certification in *Mejdrech v. Met-Coil Systems Corp.*, 2002 WL 1838141 (N.D. Ill Aug. 12, 2002) -- which was subsequently affirmed by the Seventh Circuit. *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d.

910 (7th Cir. 2003). The *Mejdrech* class was a case related to *LeClercq* in that the source of the contamination was Lockformer and Met-Coil. The class area was different than the *LeClercq* case and, as Judge Hibbler stated, "[w]hile these similarities warrant recognition, the two cases remain independent from one another. Therefore, the Court has undertaken a complete and individualized evaluation of this case." *Mejdrech v. Met-Coil Systems Corp.*, 2002 WL 1838141 at *2. Thus, two courts facing litigation substantially similar to this case have independently found that class certification is appropriate in these types of cases.

Moreover, Plaintiffs have met the requirements of Rules 23(a) and (b)(3). Consequently, the class should be certified in this case.

A. PLAINTIFFS SATISFY EACH REQUIREMENT OF RULE 23(a).

Rule 23(a) of the Federal Rules of Civil Procedure establishes four requirements for the maintenance of all class actions:

> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to this class,
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Within the framework of Rule 23, the Court has broad discretion in determining the propriety of class certification. *Retired Chicago Police Assoc. v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993); *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D.Ill. 1986).

Because each of the requirements of Rule 23 are satisfied, this Court should certify the class.

1. The Members of the Class Are So Numerous That Joinder of All Members Is Impracticable

Rule 23(a)(1) requires that the class be so large that joinder of all members is "impracticable." "Impracticability" does not mean "impossibility," but only the difficulty or inconvenience of joining all members of the class. *LeClercq v. Lockformer*, 2001 WL 199840 at *4; *Ludwig v. Pilkington North America, Inc.*, 2003 WL 22478842 (N.D. Ill. Nov. 4, 2003); 3B *Moore's Federal Practice*, ¶ 23.05 (2d Ed. 1982, Supp. 1992-93); 1 *Newberg on Class Actions*, §3.05 (December 1992).

"In determining the number of class members, precise numbers are not required so long as the plaintiff makes a good faith estimate." *Ludwig v. Pilkington North America, Inc.*, 2003 WL 22478842 at * 2. The court is entitled to make a good faith estimate of the number of class members, using common sense assumptions. *In Re VMS Securities Litigation*, 136 F.R.D. 466, 473 (N.D. Ill. 1991); *Gomez v. Illinois State Bd. of Ed.*, 117 F.R.D. 394, 399 (N.D.Ill. 1987); *Grossman v. Waste Management, Inc.*, 100 F.R.D. 781, 785 (N.D.Ill. 1984).

Plaintiffs have alleged that the class size is in excess of 800 persons and may, in fact, exceed 2,000 people. (Compl. at ¶ 28). "Generally, classes with more than one hundred plaintiffs satisfy the numerosity requirement. *Ludwig v. Pilkington North America, Inc.*, 2003 WL 22478842 at *2.

In *LeClercq* and *Medrech*, the courts found that allegations that the environmental impact, or threat of impact, affected over 130 homeowners (*LeClercq*) and approximately 1,000

910 (7th Cir. 2003). The *Mejdrech* class was a case related to *LeClercq* in that the source of the contamination was Lockformer and Met-Coil. The class area was different than the *LeClercq* case and, as Judge Hibbler stated, "[w]hile these similarities warrant recognition, the two cases remain independent from one another. Therefore, the Court has undertaken a complete and individualized evaluation of this case." *Mejdrech v. Met-Coil Systems Corp.*, 2002 WL 1838141 at *2. Thus, two courts facing litigation substantially similar to this case have independently found that class certification is appropriate in these types of cases.

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homeowners (*Mejdrech*) "satisfy the numerosity requirement of Rule 23(a)(1)." *Mejdrech v. Met-Coil Systems Corp.*, 2002 WL 1838141 (N.D. Ill Aug. 12, 2002).

2. **There are Questions of Law or Fact Common to Members of the Class**

The second prerequisite for maintenance of a suit as a class action is that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining claimant-specific issues to individual follow-one proceedings." *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910, 911 (7th Cir. 2003).

The commonality requirement is met so long as the claims arise from a common nucleus of operative fact. *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992); *Ludwig v. Pilkington North America, Inc.*, 2003 WL 22478842 at * 2; *LeClerkeq v. Lockformer*, 2001 WL 199840 at *4.

Here, questions of law and fact common to the Class include the following:

a. Did the defendants contribute to the contamination within the Ellsworth Industrial Superfund Site?

b. Whether each defendant used PCE or TCE in the operation of its business?

c. Whether each defendant disposed of PCE or TCE causing contamination to the groundwater in the Class Area?

d. The nature and extent of harms and threats of harm to the class area and the environment caused by defendants.

As in *Mejdrech v. Met-Coil Systems Corp.*, the "core questions, i.e., whether or not and to what

extent [defendants] caused contamination of the area in question" are sufficient to satisfy the requirements of Rule 23(a)(2). *See Mejdrech v. Met-Coil Systems Corp.* 319 F.3d at 911.

Courts in the Northern District of Illinois facing nearly identical issues as those present in this case have certified similar classes. *See Mejdrech v. Met-Coil Systems Corp.* 319 F.3d 910 (7th Cir. 2003) (affirming class certification of residents within an area where the defendant "leaked a noxious solvent, TCE, that has seeped into the soil and groundwater beneath the class members' homes"); *Ludwig v. Pilkington North America, Inc.* 2003 WL 22478842 (N.D. Ill) (granting class certification to homeowners whose properties were damaged by the wrongful disposal of arsenic containing waste in areas adjacent to the class members' homes); *LeClercq v. Lockformer*, 2001 WL 199840 (N.D. Ill) (granting class certification to homeowners whose properties were contaminated with TCE improperly disposed of by the defendant).

3. The Plaintiffs' Claims are Typical of Those of the Class Members

Any inquiry into typicality under Rule 23(a)(3) requires comparison of the claims or defenses of the representatives with the claims or defenses of the class. *Ludwig v. Pilkington North America, Inc.* 2003 WL 22478842 at *3. "The issue of typicality is closely related to commonality and should be liberally construed." *Id.* (internal citations omitted).

The standards of Rule 23(a)(3) are clearly satisfied here. Defendants' actions are the focus of the litigation in this case. The focus is not the Plaintiffs. Moreover, Plaintiffs are members of the class they seek to represent. Plaintiffs, like the other prospective class members, live in the area contaminated by PCE and/or TCE (the designated Superfund Site).

Since all the claims are based on the defendants' conduct typicality is satisfied in this

case.

4. **The Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.**

The final requirement of subsection (a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). There are two criteria for determining the adequacy of class representation: (1) the plaintiffs' attorneys must be qualified, experienced, and generally able to conduct the proposed litigation; and, (2) the plaintiffs must not have interests antagonistic to those of the class. *Rosario*, 963 F.2d at 1018.

Plaintiffs have retained "qualified counsel." Plaintiffs' counsel are experienced in prosecuting class action cases and environmental cases and has been frequently designated as class counsel by federal and state courts. This is persuasive evidence that Plaintiffs' counsel will be adequate again. *Gomez*, 117 F.R.D. at 401. Hence, Plaintiffs satisfy the qualified counsel prong.

Plaintiffs also satisfy the "lack of antagonism" prong. The putative class representatives have claims identical to the claims of other class members and they seek the same relief as all other members of the class. The putative class representatives understand their duties to the entire class, including the absent class members. Consequently, no antagonism exists between Plaintiffs and their class members and they are adequate representatives for this class.

B. PLAINTIFFS SATISFY THE REQUIREMENTS OF RULE 23(b).

A class must meet at least one of the three prerequisites of Rule 23(b) in addition to the four requirements of Rule 23(a). The putative class satisfies Rule 23(b)(3) because, in this case,

a class action is superior to other available methods for adjudication of the controversy and common questions predominate over individual ones. *Mejdrech v. Met-Coil Systems Corp.* 319 F.3d 910 (7th Cir. 2003); *Ludwig v. Pilkington North America, Inc.* 2003 WL 22478842 at * 4-5; *LeClercq v. Lockformer*, 2001 WL 199840 at *7.

1. **This Action Meets the Certification Requirements of Rule 23(b)(3).**

Under Rule 23(b)(3), a class should be certified where common issues of law or fact predominate over any individual issues, and where a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Here, both requirements are satisfied.

a. **Questions of Law or Fact Common to the Class Predominate.**

The initial question is whether common questions predominate over the individual questions. The present suit satisfies this test because the outcome turns primarily on the defendants' conduct in failing to comply with the law and their disposal practices of PCE and TCE. Such a case, without unique individual issues, clearly satisfies the predomination prong of Rule 23(b)(3). *Ludwig v. Pilkington North America, Inc.* 2003 WL 22478842 at * 4-5 ("a finding of commonality will likely satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts); *LeClercq v. Lockformer*, 2001 WL 199840 at *7 ("there is ample support for certifying a class action in a contamination case even though there may be individualized issues of damages"). *See also Bates v. Tenco Services, Inc.*, 132 F.R.D. 160 (D.S.C. 1990) (class action was superior because common questions including the cause of the contamination and the defendants' liability

predominated over the individual questions); *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 713 (D. Az. 1993) (class certification appropriate as common issues predominated because factual and legal issues relating to the defendants' liability did not differ between the plaintiffs).

b. The Administrative Considerations of Rule 23(b)(3) Are Satisfied.

Rule 23(b)(3) also requires a showing that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In evaluating the relative utility of the class action device, the Court should consider:

a. the interest of members of the class in individually controlling the prosecution...of separate actions;

b. the extent and nature of litigation concerning the controversy already commenced...by members of the class;

c. the desirability...of concentrating the litigation of the claims in the particular forum; [and]

d. the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

With respect to factor (a), the interest of these class members are common, and not driven by facts specific to any particular class member. Regarding factor (b), plaintiffs are informed and believe that no class member has initiated litigation independent of this action. Indeed, many class members are probably unaware of their rights in this case. *Accord Beasley*, 1994 U.S. Dist. LEXIS 9383 at * 14. Concerning factor (c), the District Court is the appropriate forum because all class members reside in this District, and were all subjected to the defendants' conduct in this judicial district. Finally, factor (d) is satisfied because the estimated size of the class, thousands

of members, is more manageable than administering thousands of identical lawsuits. *Accord, Pilkington* at *5 ("it would be neither efficient nor fair to anyone, including the defendants, to force multiple trials to hear the same evidence. . . repetitive discovery for individual cases would also be wasteful." The administrative considerations of Rule 23(b)(3) are therefore satisfied in this case.

2. The Case Also Satisfies the Requirements of Rule 23(b)(1).

Plaintiffs represent over 800 homeowners whose properties are affected by defendants' contamination. If each plaintiff was required to try his or her case individually, varying adjudications and incompatible standards of conduct would likely arise. See *Ludwig v. Pilkington North America, Inc.* 2003 WL 22478842 at * 5

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court grant an order pursuant to Federal Rule of Civil Procedure 23 determining that this action shall proceed as a class action as defined above, appointing Plaintiffs as class representatives, and appointing Plaintiffs' counsel as class counsel.

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Respectfully submitted,

By: _____
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